

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV -4 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0061
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
FRED AARON ETHRIDGE,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062979

Honorable Richard D. Nichols, Judge  
Honorable Terry L. Chandler, Judge

AFFIRMED IN PART, VACATED IN PART

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Diane Leigh Hunt

Tucson  
Attorneys for Appellee

R. Lamar Couser

Tucson  
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 A jury found appellant Fred Ethridge guilty of the following four offenses: possession and transfer of methamphetamine on June 23, 2006, and sale and transfer of methamphetamine on June 27, 2006. When Ethridge absconded in July 2007 before a scheduled trial on the state's allegation that he had historical prior felony convictions, the

trial court issued a warrant for his arrest. He was arrested in October 2009 and eventually sentenced to a mitigated, 1.5-year prison term for possessing methamphetamine, a class four felony, and to minimum, five-year terms for the other three, class two offenses. The court ordered all four sentences served concurrently.

¶2 Appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), avowing he had searched the record but had found no meritorious issues to raise on appeal and asking this court to search the record for fundamental error. After an initial review, we ordered briefing pursuant to *Penson v. Ohio*, 488 U.S. 75, 83-84 (1988), on the issue of whether Etheridge's convictions and sentences violated his constitutional right to protection against double jeopardy.

¶3 In its brief, the state acknowledges that Etheridge's convictions were based on a single quantity of methamphetamine for each of the offense dates and concedes that double jeopardy principles have been violated by (1) Etheridge's separate convictions for transfer and possession on June 23, and (2) his separate convictions for sale and transfer on June 27. *See State v. Cheramie*, 218 Ariz. 447, ¶¶ 9–12, 189 P.3d 374, 375-76 (2008) (convictions for sale and lesser-included offense of possession, arising from same transaction, constituted double jeopardy); *State v. Brown*, 217 Ariz. 617, ¶¶ 6-11, 177 P.3d 878, 881-82 (App. 2008) (separate convictions for sale and transfer, based on same transaction, constituted double jeopardy). We agree.

¶4 We have examined the record pursuant to *Anders* and have found no other issue warranting relief or further appellate review. *See Anders*, 386 U.S. at 744. Reasonable evidence in the record supports all elements necessary for Etheridge's convictions for the single offenses of transfer of methamphetamine on June 23, 2006, and sale of methamphetamine on June 27, 2006. *See* A.R.S. §§ 13-3401(6)(b)(xv), 13-

3407(A)(7), (B)(7). His five-year sentences for those offenses were the minimum terms statutorily prescribed for a class two, methamphetamine-related offense in June 2006. *See* former A.R.S. § 13-712; 2005 Ariz. Sess. Laws, ch. 327, § 3.

¶5 For the foregoing reasons, we vacate Ethridge’s conviction and sentence on count one, possession of methamphetamine on June 23, 2006, as a lesser-included offense of sale of methamphetamine, and his conviction and sentence on count four, transfer of methamphetamine on June 27, 2006. *See State v. Jones*, 185 Ariz. 403, 407-08, 916 P.2d 1119, 1123-24 (App. 1995) (when only one of two convictions may stand, “[g]enerally the ‘lesser’ conviction is vacated”).<sup>1</sup> We affirm his remaining convictions and sentences.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

---

<sup>1</sup>In light of this authority, we reject Ethridge’s apparent suggestion that we vacate both convictions for the offense he committed on June 23. We also reject the state’s suggestion that we modify Ethridge’s conviction for the June 27 offense to reflect a “merger” of his convictions under the state’s two legal theories. *See Jones*, 185 Ariz. at 407-08, 916 P.2d at 1123-24 (determining, for purpose of vacating multiplicitious conviction, which of two kidnapping convictions was “lesser”); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998) (possession of marijuana for sale vacated as lesser-included offense because possession “incidental” to transportation for sale). Although “the terms ‘sale’ and ‘transfer’ in [A.R.S.] § 13-3408(A)(7) . . . represent different ways of committing the same offense when a single transaction is involved,” *Brown*, 217 Ariz. 617, ¶ 10, 177 P.3d at 882, we regard the transfer as incidental to the sale in this case and, therefore, as the lesser of the two convictions.